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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1965**

**No. 492**

McFADDIN EXPRESS, INCORPORATED, L & L LEASING CORPORATION and LOUIS DeBERADINIS, JR.,
*Petitioners,*

—v—

THE ADLEY CORPORATION; MICHAEL L. ADLEY, DONALD A. ADLEY, RALPH J. ADLEY and DANIEL J. ADLEY,

and

UNITED STATES OF AMERICA,
*Respondents.*

## PETITIONERS' RESPONSE TO MEMORANDUM FOR THE UNITED STATES

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## PETITIONERS' RESPONSE TO MEMORANDUM FOR THE UNITED STATES

This response of petitioners is submitted pursuant to the opportunity made available by the Court for comment on the views presented in the Solicitor General's memorandum (herein called the "memorandum") filed in connection with this petition for certiorari (herein called the "petition").

(1) The memorandum is concerned principally with the merits of the jurisdictional issue involved in this case, and in that connection first presents an argument for the presence of federal jurisdiction and then relates the contrary views of the ICC. The petition

subordinates discussion of the merits of the issues, and concentrates on the nature of the problems posed by the decision below and which call for resolution by this Court, regardless of how those issues might be decided by the Court. Thus, with respect to the reasons for granting certiorari, there are conflicts between a number of the Courts of Appeals, and these conflicts should be resolved. That aspect receives little attention in the memorandum, and is ignored by the ICC. In connection with the administrative agency order here involved, there is a conflict between the Second Circuit, the Seventh Circuit, and the Fifth Circuit (see p. 12-13 of the petition). There is, furthermore, a conflict between the Second Circuit and the Eighth Circuit with respect to the division of revenues of jointly operated carriers (see p. 18-19 of the petition). The resolution of these conflicts and the clarification of the law, on both the substantive and jurisdictional questions presented, can be accomplished only by the grant of certiorari in this case. Nothing in the memorandum contradicts this conclusion.

In addition, this case presents substantive issues of federal statutory interpretation and administrative procedure which raise questions of first impression. These questions concern the statutes discussed in the petition, and the statutory role required of the ICC in the legislative pattern of regulation. The memorandum likewise does not deny that there are such novel questions involved in this case. These questions are not settled by the speculation of the ICC or by lower courts of limited geographical jurisdiction.

These are questions involved in a national statutory scheme and, it is respectfully submitted, require the determination of this Court (see p. 16 and 17 of the petition).

(2) The position of the ICC, presented in the memorandum, places a small trucker such as McFaddin in an unfair and prejudiced position, and could not represent the intent of Congress. That position of the ICC is a rejection of responsibility and duty which the statute seems to require of the ICC.

The ICC takes the position that, once it has authorized temporary control in a situation such as this one, it has no further regulatory function in connection with the way in which that control is exercised. The view of the ICC is that it can authorize temporary control, and then abstain from further involvement, even where that control is used in interstate commerce by the one carrier to kill and swallow the other carrier. That is a matter, according to the ICC, "appropriately left to private adjustment" (memorandum, at p. 5).

That position of the ICC is both unfair and an improper abdication of authority. The statute exposes the smaller carrier to the risks of temporary control, and at the same time, it is submitted, offers the protection of administrative regulation of those risks. The small or vulnerable carrier such as McFaddin is compelled by the federal statutes to submit to temporary control until the period elapses in which the ICC considers whether or not to give its approval to the sale. In the absence of the federal statutes, car-

riers such as McFaddin would consummate an immediate sale; instead, they are compelled to submit to temporary control by the other carrier and are exposed to abuse and manipulation by the other carrier. It would be unfair, and is contrary to the statutory provision and scheme, to expose the smaller carrier in this manner and not at the same time make available correlative protection through the control and supervision of the administrative agency. McFaddin in this case, and smaller carriers in other cases of temporary control, rely on the protection and deterrence of ICC supervision during this period of vulnerability.

It is a strange construction of §310a(b) and (c) to say that the assumption of temporary control must meet the statutory standards and the scrutiny of the ICC, and can be obtained only on order of the ICC, but that the statutory standards can then be flouted and frustrated without any obligation of control and supervision by the ICC. There is a public interest here, which is responsible for the imposition of federal regulation, and that public interest does not dissolve instantly upon the award of temporary control. The statutory language of §310a(b) and (c) makes it clear that the purpose of temporary control is to preserve the controlled carrier, and that it is the duty and obligation of the ICC to participate and protect that carrier and the public interest. This clearly is much more than a matter of "private adjustment".

(3) The memorandum grounds the questions in this case on violations of an ICC order—the Commission's §310a(b) order. The nature and effect of that order

is assuredly an important issue in this case. But, although not discussed in the memorandum, the issues in the case are more extensive, involving not only administrative violations but also questions of violations of federal statutes. These questions involve both the substantive meaning and effect of these statutes and their implications for purposes of federal jurisdiction. This aspect of the issues posited for decision, concerning the violations of federal statutes, is not discussed in the memorandum.

Thus, a fundamental problem posed by this case is whether one motor carrier in interstate commerce can destroy and absorb a smaller competing motor carrier in interstate commerce, through the subterfuge of the federal statutory mechanism of temporary control, in effect achieving a combination of the carriers through that device without ICC approval—indeed in the face of ICC disapproval—and yet not violate any federal statute and not raise a question of federal interest? Does such an evasive and deceptive distortion of the statutory vehicle, used in this manner deliberately, violate the express provisions and the underlying intent of 49 U.S.C. §5 (prohibiting a combination of carriers without ICC approval), 49 U.S.C. §310a(b) (providing for temporary control only to preserve a carrier), 49 U.S.C. §310a(c) (specifying that the federal statutes apply to transportation service during temporary control), and 49 U.S.C. §322 (imposing penalties for such statutory violations)?

What is involved here is not only a violation of an order of the ICC but also a violation of the federal statutes and their underlying policies. Those statutory violations caused the injuries of which McFaddin

complains. The issues thereby raised are questions of first impression involving the scope and meaning of those federal statutes, and these novel questions need to be resolved by this Court.

(4) The question of the effect of an ICC order, such as is here involved, is of broad importance. This is shown by the conflict generated by such orders in the decisions of the Courts of Appeals, cited at p. 12 and 13 of the petition. Such orders are involved not only in motor carrier cases but also in railroad cases, as illustrated by those Courts of Appeals decisions. Similar orders may also be issued by any other administrative agency which makes elective the adoption of a course of conduct, and is concerned with the way in which the authorized course is then carried out.

The memorandum states, at p. 5, that "the problem" appears not to be one of frequency or importance. It is not clear to what "problem" reference is intended. If the nature and effect of ICC orders of this type in their application to railroads and motor carriers is the "problem", then that observation is inaccurate for the reasons stated above and in the petition. However, in view of the discussion which follows at that point in the memorandum, the "problem" intended may relate to the area of temporary control of motor carriers. If that is the "problem" which is said to be neither frequent nor important, then that observation, even if true, is of little significance because of the other issues requiring resolution by this Court which go beyond the matter of temporary control. Moreover, if that is the "problem", it is not true to say that it is neither frequent nor important. The occurrence of temporary control certainly is frequent, tak-

ing place as the typical intermediate stage whenever there is an acquisition of a motor carrier, and is important enough to move Congress to enact statutes and give legislative directions specially concerned with the problem. Abuse or subversion of the statutory scheme can have a very serious impact on many motor carriers, particularly smaller or weaker carriers. Evidence, of the interest in the temporary control arrangement and of the importance of the opportunity for damage during temporary control, is furnished by inquiries about the instant litigation received from motor carriers separated geographically as widely as Trenton, New Jersey and Minneapolis, Minnesota.

The ICC apparently takes a different view where its order "in terms command obedience". Why the "problem" becomes more frequent or more important where there is such a command is not clear, since the statutory provisions and the statutory plan, the positions of the carriers, and the economic considerations remain identical. Indeed, the position of the ICC, that the order in this case has nothing mandatory in it, is highly questionable and is one of the matters which needs to be resolved, not only for purposes of motor carrier control but also with respect to railroad control and with respect to controls of other regulatory agencies.

The view of the ICC that the "problem" is neither frequent nor important therefore does not dispense with the need of review by this Court through the grant of the petition.

(5) The memorandum, at p. 6, states that a federal damages remedy would "largely" duplicate a

state remedy of a suit for breach of contract. The action here is founded, however, on breach of federal regulatory requirements pertaining to the control of interstate motor carriers and not on a breach of contract. In that connection precedent shows that the existence of a contract on which a common law action might be brought does not preclude the existence of a federal interest and federal jurisdiction where there are also violations of federal statutes or federal administrative requirements. See p. 17 and 18 of the petition. The construction and enforcement of a contract, and the rules of damages, are affected by variations in local law among the state jurisdictions, and in prosecuting such an action in a state court there is likely to be a minimal and varied response to the considerations underlying the federal statutory plan intended to furnish a national pattern of control of carriers in interstate commerce. As a result of these factors, even the damages recoverable in a federal action based on statutory and administrative violations may vary from those recoverable in the different state courts in actions based merely on a breach of contract. In any event, that is one of the matters on which there is a conflict among the Courts of Appeals and which needs resolution by this Court, and to presume the answer merely begs the question. See *Florida East Coast Ry.* v. *Jacksonville Terminal Co.*, 328 F.2d 720, cert. den. 379 U.S. 830; p. 18 of the petition.

(6) The memorandum as a whole demonstrates not only that there is considerable merit for the claim of federal jurisdiction but, more importantly for the purpose of this petition, that there are conflicts and open questions which warrant grant of the petition for

certiorari and action by this Court. Thus the memorandum makes a convincing argument for the presence of federal jurisdiction but recognizes that it is not free from doubt, particularly with respect to views which are so carefully confined to the ICC as to make questionable whether they also represent the views of the Solicitor General or the United States. These conflicts and open questions are precisely the reasons for the grant of the petition in this case.

Respectfully submitted,

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January 1966